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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RONELL M. DRAPER, Defendant and Appellant.	B149985 (Super. Ct. No. SA034571)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Ronell Draper appeals from his conviction of one count of second degree murder. He claims the trial court committed prejudicial error in admitting evidence of his prior assaults. He also claims the court erred in failing to instruct the jury on involuntary manslaughter and imperfect self defense. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Lloyd Frank was a homeless man who lived at Venice Beach. His body was found partially buried on the beach on May 17, 1997. The cause of death was manual strangulation. He also had blunt force injuries and lacerations which could have been caused by a glass bottle. There was sand in his mouth, which may have been a contributing cause of his death. Frank had a blood alcohol level of .30.

Defendant gave a statement to police in December 1997. He had been living at Venice Beach at the time of Frank's death. Defendant had been drinking on the day of the incident. At about 9:00 p.m., he walked on the beach and saw Frank talking to Joshua Davis, a 16-year-old who also lived at the beach. Davis told defendant that Frank wanted to orally copulate him (Davis); defendant told Davis to do what he wanted. Davis then suggested that they kill Frank, and he and defendant began beating Frank up. Davis hit him with two beer bottles and cut him with the bottles; defendant sat on Frank's chest and hit him; Davis scooped sand into Frank's mouth and held his mouth shut; then defendant strangled Frank with his hands.

Defendant and Davis hitchhiked to Washington State the next day. Davis then went to Maine, where his family lived. The two men were separately arrested and charged with Frank's murder. Defendant's first trial ended in a mistrial. Defendant was retried in a joint trial with Davis; the two men had separate juries.

Defendant was found guilty of second degree murder and sentenced to a term of 15 years to life. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Defendant claims the court erred in admitting evidence of prior assaults he committed. This evidence came from the testimony of two witnesses called by codefendant Davis.

The first was Tony Keep, who also was living at Venice Beach at the time of the crime. Keep knew defendant by the nickname "Kid." He also knew the victim, Lloyd Frank, but not by name. During direct examination by Davis, Keep testified that he had seen defendant and Frank involved in disagreements a few times. On one occasion about a month before Frank's death, defendant called a woman who was with Frank "a bitch." Frank became angry and threatened defendant. There were no blows, just "a big, huge argument." Some time after that, Keep saw Frank looking for defendant. Frank had a gun and told Keep he was going to kill defendant. Keep thought he told defendant what Frank said, but he was not sure. Keep saw Frank three more times, "doing the same thing," looking for defendant. The last time was a few days before Frank died.

On cross-examination by defendant, Keep was asked exactly what Frank said to defendant during that first argument, whether he said he was going to kill him, or going to get him. Keep replied, "I think he said, 'I'll be back.'" Keep was asked if he took that as a threat. He said, "Of course it's a threat. Do you know what I mean? If you threaten somebody down at the beach, it's--usually it's gonna happen."

During cross-examination by the prosecutor, Keep testified that he had seen defendant drinking, arguing with people, and getting "beat up all the time." He

testified he never saw defendant threaten people, he always saw him "getting threatened or getting beat up." The prosecutor asked whether Keep ever heard defendant threaten anyone in a fight. Defendant objected, pursuant to Evidence Code section 352,[1] and argued that evidence of defendant's prior fights or prior threats was inadmissible as prior bad acts.

Under section 1101, subdivision (a), "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

The prosecutor argued the evidence was admissible under section 1103, which sets out an exception to this prohibition against character evidence. Subdivision (a)(1) of that section permits evidence of the character of the victim of the crime, in the form of specific instances of conduct, if "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Subdivision (b) provides: "In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of . . . evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character *and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant* under paragraph (1) of subdivision (a)." (Italics added.)

According to the prosecutor, defendant had "opened the door by showing that Mr. Frank has these prior bad acts and prior threats and acts of violence against Mr. Draper . . . ." Defendant's counsel argued that she had not called the

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[1] All statutory references are to the Evidence Code unless otherwise indicated.

witness, and had not presented evidence of Frank's prior violent acts. She asserted defendant should not be prejudiced by evidence presented by codefendant Davis. The court noted defendant had not objected to that evidence. More importantly, defendant elicited further testimony as to Frank's specific statement threatening defendant. By failing to object and by pursuing the inquiry as to Frank's prior acts, defendant adduced evidence of the victim's character for violence, within the meaning of section 1103, subdivision (a)(1). Evidence of defendant's prior acts demonstrating *his* character for violence was therefore admissible under section 1103, subdivision (b).

Defendant also sought to exclude from his jury's consideration testimony of Dianne Taylor, another witness called by codefendant Davis. Taylor also was homeless and lived at Venice Beach. The prosecution intended to ask Taylor about a statement she had given to police describing conversations she had with defendant in which he said he wanted to kill people or hurt people. The prosecutor argued this evidence was admissible to rebut testimony by Keep that defendant was a poor fighter who spent most of his time on the beach getting beaten up.[2] He sought to elicit testimony from Taylor that defendant is violent; that he talked about wanting to kill people and wanting to strangle people; and that Taylor had seen defendant fight with a person named Mateo and defendant held his own in that fight.

Under section 1101, subdivision (b), evidence of other acts may be admissible when the evidence is relevant to prove a fact, other than a person's disposition to commit such an act, such as motive, intent, or plan. In this case,

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[2] On cross-examination, Keep was asked about his statements to police that he had seen defendant threaten people with a bottle, and had seen him use his fists in fights. Keep testified he only remembered seeing defendant getting beaten up in fights, and did not recall him threatening anyone with a bottle; he did not even remember one of the two interviews with police in which it was claimed he made that statement.

defendant's intent was at issue. He admitted strangling Frank, but told police he did not intend to kill him. Defendant's statements to Taylor[3] before Frank's death that sometimes he wanted to kill people, that he wanted to hurt people by strangling them, and that he would put his hands around their necks to strangle them, are all relevant to his intent in the charged crime. (See *People v. Lang* (1989) 49 Cal.3d 991, 1014-1015.) The statements were not inadmissible character evidence.

The court also permitted Taylor to testify that she walked defendant away from many fights, that she had seen defendant in a fight with Mateo, and that on one occasion she saw defendant with bloody and swollen hands and he reported that he had just won a fight and would have buried his opponent if he had had the chance. This evidence was admissible for the same reason Tony Keep's testimony about defendant's prior acts was admissible: as rebuttal to defendant's evidence of the victim's propensity for violence. (§ 1103, subd. (b).)

We find no abuse of discretion in the court's conclusion that the probative value of this evidence outweighed its potential for prejudice. Evidence of defendant's prior assaults was probative to rebut inferences that the victim had provoked the fatal incident, or that defendant was somehow incapable of fighting. Nor was Taylor's testimony about the fights merely cumulative. Keep testified that defendant always was getting beaten up, and that he had problems with his hands and feet. The prosecution was entitled to rebut this evidence with Taylor's testimony, including her statement that defendant reported he was the victor in at least one of the fights.

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[3] These statements are not made inadmissible by the hearsay rule because they are voluntary admissions of a party. (§ 1220.)

The potential for prejudice to defendant was slight. He admitted sitting on the victim and strangling him while Davis hit the victim over the head with a bottle and stuffed sand in his mouth. Defendant told police the victim was trying to fight him off and was gasping for breath while he was being strangled. He also told police he would get violent when he drinks, that it did not take much to get him angry, and that he strangled people all the time when he fought. On this record, the trial court could reasonably conclude that evidence of defendant's prior assaults was not more prejudicial than probative. The court did not abuse its discretion in admitting this evidence.

Defendant argues that to the extent his claims are rejected based on his trial counsel's failure to object to evidence of his prior fights, we should find he received ineffective assistance of counsel. There are two components to a claim that counsel's assistance was so defective as to require reversal of a conviction: (1) defendant must establish that counsel's representation fell below an objective standard of reasonableness; and (2) defendant must show prejudice resulting from counsel's alleged deficiencies. (*In re Marquez* (1992) 1 Cal.4th 584, 602-603; *Strickland* v. *Washington* (1984) 466 U.S. 668, 688, 693-694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland* v. *Washington, supra*, 466 U.S. at p. 697.) To establish prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at pp. 693-694.) There was no prejudice in this case.

First, the evidence of defendant's prior assaults from Keep and Taylor was not inflammatory. Keep's trial testimony about the prior fights painted defendant as an incapable victim. In prior statements to police, he said he had seen defendant get into a fistfight when he was drunk, and that defendant may have threatened his opponent with a bottle. But Keep did not remember giving this statement, and testified that he may have been on a lot of medication at the time of that interview. Taylor's testimony regarding defendant's fights was only slightly more inculpatory. The trial court instructed the jury in terms of CALJIC No. 2.50, the standard limiting instruction which warns that evidence of other crimes may not be considered to prove that the defendant is a person of bad character or has a disposition to commit crimes.

Moreover, the evidence against defendant included his detailed admission to the police of his role in killing Frank. In that statement, defendant told police he frequently was violent, that he strangled people all the time when he fights, and that he had been involved in a number of fights in which he choked the person with whom he was fighting. Defendant told the police he beat up a person named Tim a couple of times; he also admitted beating up a person named Rick, but insisted that Rick instigated these fights.

In light of defendant's own admission that he frequently was involved in fights, the court's instructions to the jury as to the proper use of that evidence, and the overwhelming evidence of defendant's guilt, there is no reasonable probability that a different result would have followed had counsel succeeded in having the limited evidence from Keep and Taylor on defendant's prior fights excluded.

II

Defendant claims the court erred in refusing to instruct the jury on the lesser included offense of involuntary manslaughter pursuant to CALJIC No. 8.45 or

8.47, or to otherwise inform the jury that if it found defendant was intoxicated, the appropriate verdict would be involuntary manslaughter. We find no error.

There was uncontradicted evidence that defendant was drunk at the time he and Davis caused Lloyd Frank's death. Defendant told police that during the fight with Frank he "wasn't all with it. I was drunk. All I was, I was doin' was fightin'." Codefendant Davis testified that on the day of this incident, he and defendant had been drinking all day and were drunk.

Defendant sought instructions on voluntary intoxication. The court instructed the jury in terms of CALJIC No. 4.21: "In the crimes of first and second degree murder or that of voluntary manslaughter, which is a lesser crime thereto, a necessary element is the existence in the mind of the defendant of the specific intent or mental states which are defined elsewhere in these instructions. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required specific intent or mental state. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent or mental state, you must find that he did not have that specific intent or mental state."

The court also instructed in terms of CALJIC No. 4.22: "Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug, or other substance knowing that it is capable of an intoxicating effect, or when he willingly assumes the risk of that effect. [¶] Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug, or other substance."

Defendant argues that once the trial court determined there was sufficient evidence to support intoxication instructions, it was required to instruct on involuntary manslaughter based on intoxication. His theory is that if the jury found he was intoxicated, the appropriate verdict would have been involuntary

manslaughter, and failure to instruct on that lesser offense left the jury without a legally correct crime upon which to base a conviction. We disagree.

Intoxication instructions are not required when the evidence shows that a defendant was drinking, unless the evidence also shows that the defendant became intoxicated to the point that he failed to form the requisite intent or attain the requisite mental state. (*People v. Williams* (1988) 45 Cal.3d 1268, 1311.) In *People v. Ivans* (1992) 2 Cal.App.4th 1654, the defendant testified that at the time of a shooting he had been high on speed for a month and awake for three or four days. Ivans also gave detailed testimony about the events on the morning of the shooting, including meeting with a person, borrowing a weapon from a friend, going to retrieve a truck, and getting into an argument with his ex-girlfriend who was in the back of the truck. The reviewing court found that Ivans' detailed account of the events surrounding the crime belied his claim that his drug use had affected his mental state, and concluded that there was no duty to instruct on voluntary intoxication.

In our case, too, defendant's highly detailed description of the events surrounding Frank's death undermines his claim that his voluntary intoxication precluded his formation of the requisite mental state. Defendant recounted the incident that caused Davis to want to attack Frank. He stated that Davis said "Let's kill him," but that defendant thought they were just going to beat Frank up. Defendant described the attack in graphic detail, stating that Davis broke two beer bottles over Frank's head and cut him and stabbed him with a bottle; that defendant sat on Frank's chest and punched him; that Davis stuffed sand into Frank's mouth and held his mouth shut while defendant strangled him with his hands; and that Frank gasped for breath and tried to fight back while defendant was strangling him.

Defendant did not remember wanting to move the body or asking anyone for help moving Frank's body, nor did he recall putting sand on top of the body. But

he did remember that after the incident "I sat down for a while and I thought about it." He thought about having done something wrong; he thought the victim was dead, but was hoping that was not the case. He remembered taking his sweater off and throwing it in a nearby trash can.

Given defendant's detailed recollection of the incident, the evidence was insufficient to require an instruction on voluntary intoxication, despite evidence that defendant had been drinking or was drunk. (See *People v. Ivans, supra*, 2 Cal.App.4th at pp. 1661-1662.) The fact the court gave some instructions on voluntary intoxication, in the form of CALJIC Nos. 4.21 and 4.22, was a benefit to defendant. But those instructions, given through an abundance of caution or mistake, did not entitle defendant to more. (See *People v. Frierson* (1979) 25 Cal.3d 142, 157.)

There was absolutely no evidence that the killing occurred while defendant was unconscious due to voluntary intoxication. Unconsciousness in this context can be found """where the subject physically acts in fact but is not, at the time, conscious of acting.""" (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424, quoting *People v. Kelly* (1973) 10 Cal.3d 565, 572.) Given defendant's detailed description of the incident, he was unquestionably aware of his actions and there was no basis for a jury to conclude he was unconscious due to voluntary intoxication.

Nor was there an evidentiary basis for involuntary manslaughter instructions based on his intoxication. The evidence was that defendant consciously strangled Frank to death, even while Frank struggled against him and audibly gasped for breath. In *People v. Rowland* (1982) 134 Cal.App.3d 1, 9, the court held that strangulation with an electrical cord shows a deliberate intent to kill, which is a means of establishing malice aforethought. Strangulation with bare hands demonstrates at least as much. (See *People v. La Vergne* (1966) 64 Cal.2d 265,

270-271 [Proper to instruct that homicide resulting from strangulation indicates malice].)

III

Defendant's final claim is that the court erred in refusing to instruct on imperfect self defense. Unreasonable self defense--"'the unreasonable but good faith belief in having to act in self defense'"--is another means of negating the element of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88-89.) The evidence in this case did not support an instruction on unreasonable self defense.

Codefendant Davis testified that Frank grabbed him and tried to kiss him on the neck. Then when Davis went to urinate on the beach, Frank grabbed Davis's crotch area. Davis said he was afraid that Frank was going to rape him. Davis pushed Frank away, then hit him on the head with a bottle. Frank staggered, then turned around and tackled Davis around the waist. Davis tried to push him off. The two men were wrestling when defendant came and pulled Frank off of Davis. Davis said he then ran to a trash can to find something with which to wrap his thumb, which he had cut. He testified that he washed his thumb in the water, then went back up to the boardwalk and walked; he did not see defendant again that night. When he saw defendant the next day, defendant told him Frank had died.

Defendant told police that on the night of Frank's death, he saw Davis and Frank sitting together drinking. Davis came over to defendant and said that the other man (Frank) "wants to suck my dick." Defendant replied, "'Hey, Man, it's up to you all. You all can do what you all wanna' do,' and I was gonna' go, go somewhere and sleep. And then uh, he said - I think he said, "Let's kill him.' And I said, "yeah, alright. Whatever.'" After that, Davis punched Frank in the head, then he and defendant started beating him up. Davis hit Frank with a beer bottle while defendant hit him with his fists. Frank fought back.

According to defendant, Davis broke two bottles on Frank, "and then he got, he got carried away. He wanted, he wanted to kill him. He was cuttin' him." Defendant sat on Frank's chest and was punching him while Davis scooped sand into Frank's mouth and held it shut. Frank was trying to fight back. Defendant put his hands around Frank's neck and choked him. Frank tried to get defendant off of him; he was gasping for breath. Defendant was asked if he ever thought to stop. He replied, "I stopped doin' it. I stopped one time. I stopped wh, wh, when, when we were halfway through it. I stopped, and I just didn't do nothin'. I just did, did nothin'. And then I started up again after he said that they had been talkin'."

No matter which version of the incident was credited, there is no evidence indicating that defendant strangled Frank based on a good faith but unreasonable belief in the need to defend Davis. The court properly refused to instruct on imperfect self defense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

CURRY, J.